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No. 86-88

In the Supreme Court of the United States

OCTOBER TERM, 1986

CITICORP INDUSTRIAL CREDIT, INC., PETITIONER

v.

WILLIAM E. BROCK, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a secured creditor that forecloses on collateral that was produced by its debtor under conditions that violated the minimum wage and overtime provisions of the Fair Labor Standards Act can be enjoined, as the debtor could have been, from introducing the tainted assets into interstate commerce.

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STATEMENT

1. Petitioner makes commercial loans to industrial borrowers (J.A. 148-149). On December 14, 1983, petitioner entered into a financing agreement with Qualitex Corporation, the corporate predecessor of a group of companies consisting of the Ely Group, Inc. ("Ely Group") and its subsidiaries Rockford Textile Mills, Inc. ("Rockford"), and Ely & Walker, Inc. ("Ely & Walker") (collectively "Ely") (Pet. App. 2a; see J.A. 343-411). Ely did business in Tennessee, manufacturing and warehousing textiles for distribu-

tion nationwide (Pet. App. 19a).[1] Petitioner agreed to lend Ely up to $11 million by transferring funds on a daily basis to Ely's so-called "zero balance bank account" to meet Ely's daily operating expenses (*id.* at 2a & n.1). The collateral securing the loan included, among other things, Ely's inventory (*id.* at 2a; J.A. 356-357).

The financing agreement obligated Ely to provide petitioner with daily, weekly, and monthly financial reports (Pet. App. 2a-3a). Petitioner sent its representatives to Ely's premises to monitor Ely's inventory, sales, credits, and purchases (*id.* at 20a). Although it did not verify that wages were paid to Ely's employees, petitioner checked payroll records to determine whether Ely paid employee taxes (*ibid.*).

Ely's sales started falling below projections in the fall of 1984, and Ely stopped reporting to petitioner in January 1985 (Pet. App. 20a). By early February 1985, Ely's loan balance had increased to approximately $9,500,000 (*id.* at 3a), and Ely had defaulted on certain obligations under the financing agreement (*ibid.*). Petitioner last advanced funds to Ely on February 8, 1985 (*ibid.*). On February 11, 1985, petitioner terminated the financing agreement and demanded payment in full of Ely's obligations (*id.* at 20a; J.A. 300-301, 412-413). Ely's employees, many of whom were working on rush orders of seasonal clothing for three large retail chains (see J.A. 274-280), were not informed of this action. They continued working until February 19, 1985, when petitioner foreclosed and took possession of the collateral and Ely ceased operations (Pet. App. 3a). Petitioner's representatives remained on Ely's premises through that date, monitoring Ely's activities (J.A. 191, 192, 214, 215, 230, 277, 278).

[1] Rockford manufactured hosiery at a plant in McMinnville, Tennessee (Pet. App. 29a). Ely & Walker manufactured clothing in Paragould, Arkansas, and in Memphis, Tennessee, where it also operated a warehouse (*id.* at 19a, 21a).

2. Following the plant closings, the Wage and Hour Division of the Department of Labor began an investigation to determine whether Ely's employees had been paid in accordance with the Fair Labor Standards Act of 1938 ("FLSA" or "Act"), 29 U.S.C. 201 *et seq.* (see J.A. 17-18, 260, 281). The investigation revealed that Ely had failed to pay its employees for various periods dating from January 27, 1985, to February 19, 1985 (Pet. App. 3a). Under those circumstances, Ely, had it remained in possession of the collateral, would have been prohibited by Section 15(a)(1) of the FLSA, 29 U.S.C. 215(a)(1), from placing in interstate commerce any goods produced by its unpaid employees.

The Department of Labor investigators learned that petitioner had issued a press release stating its intention to sell the collateral on which it had foreclosed under the financing agreement (Pet. App. 22a), and that it had actually shipped a portion of Ely's goods interstate with knowledge that the Ely employees had not been paid (*id.* at 21a). On March 15, 1985, and March 21, 1985, the Secretary accordingly brought separate but related actions against Ely and petitioner in the United States District Courts for the Eastern and Western Districts of Tennessee. The Secretary alleged actual and potential violations of Section 15(a)(1) of the FLSA and moved for temporary restraining orders and preliminary injunctions prohibiting Ely and petitioner from placing in interstate commerce goods produced from February 3 through February 19, 1985 (Pet. App. 3a-4a). Both

courts subsequently entered the preliminary injunctions (*id.* at 27a, 33a).

Both courts held that Section 15(a)(1)—which makes it unlawful for "any person" to ship in interstate commerce "any goods in the production of which any employee was employed in violation [of the FLSA minimum wage and overtime provisions]"—prohibited not only Ely but also petitioner from placing in interstate commerce goods produced in violation of the FLSA. The courts noted that the statute makes no exception for creditors who acquired these so-called "hot goods" through foreclosure, and the courts "refuse[d] to read such an exception into the Act." Pet. App. 32a; see *id.* at 25a.

Both courts reasoned that this straightforward reading of Section 15(a)(1) drew support from the statutory policy of excluding from interstate commerce "goods produced under substandard labor conditions, which would compete unfairly with goods produced by complying employers" (Pet. App. 24a; see *id.* at 31a). As the Western District court noted, "[t]his 'evil' is the same whether the goods are sold and shipped in commerce by the manufacturer or by a foreclosing creditor" (*id.* at 24a); "[m]oreover, if foreclosing creditors are free to ship and sell tainted goods across state lines, the temptation to overextend credit to marginal producers is strong, as is the likelihood that such producers will become unable to meet their payrolls" (*ibid.*).[2]

[2] The court in the Western District expressly found that, while there was no evidence of collusion between petitioner and Ely, "the evidence does show that [petitioner] knew it was funding the payroll of Ely Group, Inc., and when this funding ceased Ely could not meet its payroll obligations to its employees" (Pet. App. 19a). In addition, the court found that petitioner had shipped goods in interstate commerce after Ely ceased operations "and did so with knowledge that employees of the various entities had not been paid" (*id.* at 21a). Specifically, the court found that petitioner had shipped 1800 dozen shirts valued in excess of $100,000 and 2000 dozen shirts valued at about $182,000 to Walmart and Sears, Roebuck & Company stores (*ibid.*). The court also noted that petitioner had negotiated a possible sale of a major part of Ely's assets and planned an imminent transfer of inventory from Ely & Walker's Memphis warehouse to Nashville, Tennessee (*ibid.*).

The district courts therefore concluded that "[s]ecured creditors such as [petitioner] take their security subject to the laws of the land. If such creditors have a security interest in property that was produced in violation of the provisions of the Fair Labor Standards Act, they retain their security interest"— but that interest "is subject to the provisions of the Act." Pet. App. 25a; *id.* at 32a.

3. A divided panel of the court of appeals affirmed (Pet. App. 1a-16a).[3] The court "follow[ed] the 'plain

[3] On April 10, 1985, the United States District Court for the Eastern District of Tennessee granted petitioner's motion for a stay of the preliminary injunction pending appeal to permit the delivery and sale of inventory worth about $200,000, on the condition that petitioner place the proceeds of the sale in a separate interest-bearing account to be used to pay the wages of Ely's former employees at Rockford in the event of an ultimate decision that Section 15(a)(1) applies to petitioner (J.A. 104-105). The district court in the Western District of Tennessee denied a similar motion, but the court of appeals granted a stay on the same conditions on March 29, 1985 (Pet. App. 4a), to permit petitioner to sell Ely and Walker's assets as an ongoing business for approximately $2,300,000 (Appellant's Motion For Stay Pending Appeal 4). The court of appeals subsequently modified the stay to permit petitioner, which had paid more than $4.5 million into an interest-bearing escrow account, to withdraw all but $1.5 million dollars (Pet. App. 34a-35a).

language' of the statute" in "conclud[ing] that the phrase 'any person' applies to [petitioner], as a secured creditor" (*id.* at 7a (footnote omitted)). In reaching this conclusion, the court emphasized that "one of the reasons that Congress passed the FLSA was to exclude tainted goods from interstate commerce" and that "prohibiting secured creditors, such as [petitioner], from shipping 'hot goods' in interstate commerce furthers that Congressional intent" (*ibid.*). This result, the court reasoned, "does not change the priorities in bankruptcy. [Petitioner] 'owns' the goods. The 'hot goods' provision merely prevents [petitioner] from shipping, delivering or selling the goods in interstate commerce" (*id.* at 10a).

The court accordingly rejected the reasoning of *Wirtz* v. *Powell Knitting Mills Co.*, 360 F.2d 730 (2d Cir. 1966), which had held that Section 15(a)(1) is inapplicable to secured creditors who take possession of goods produced in violation of the FLSA. The court of appeals found the creation of such a judicial exception to the reach of Section 15(a)(1) inappropriate (Pet. App. 9a). The court also concluded that such an exception would be inconsistent with the congressional intention that hot goods not "taint the channels of interstate commerce" or "compete with goods produced in conformity with the FLSA's minimum wage and overtime provisions" (*id.* at 10a).[4]

[4] Judge Engel dissented (Pet. App. 13a-16a). He noted that "[i]f we were writing upon a clean slate, the majority opinion, in adopting a literal interpretation of the Fair Labor Standards Act, would have considerable appeal for the term 'any person' is indeed broad and has been carefully defined by Congress" (*id.* at 13a). In his view, however, under a "common sense application of section 15(a)(1), Congress was looking instead at application of the Act in the course of the ongoing production of goods and not at the situation obtaining here" (*id.* at 15a). He therefore would have followed the holding of *Powell Knitting Mills* (see Pet. App. 15a-16a).

ARGUMENT

The decision of the court of appeals is correct. Both the language and the purposes of Section 15(a)(1) indicate that foreclosing creditors such as petitioner should be barred, like the debtors on whom they have foreclosed, from shipping hot goods in interstate commerce. And the conflict in the circuits on this point alleged by petitioner is neither sufficiently fixed nor of sufficient importance to require consideration by this Court. Further review of the court of appeals' decision is accordingly not warranted.

1. a. The Fair Labor Standards Act of 1938 was intended "to exclude from interstate commerce goods produced * * * under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced." *United States* v. *Darby*, 312 U.S. 100, 109-110 (1941). See 29 U.S.C. 202(a). To achieve this purpose, Section 15(a)(1) prohibits "any person" from "transport[ing] * * * or sell[ing] in commerce * * * any goods in the production of which any employee was employed in violation of [the FLSA's minimum wage and overtime provisions, 29 U.S.C. 206, 207]." 29 U.S.C. 215(a)(1). Section 3(a) of the FLSA in turn expansively defines "person" to include "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons." 29 U.S.C. 203(a). En-

tities like petitioner thus fall squarely within the language of Section 15(a)(1)—as both the dissenting judge below (see Pet. App. 13a) and the Second Circuit in *Wirtz* v. *Powell Knitting Mills Co.*, 360 F.2d 730, 732 (1966), acknowledged.

Congress itself carefully considered the need for exceptions to the prohibition on shipment of hot goods by "any person." Section 15(a)(1) contains two explicit exceptions. The first, which was enacted with the original FLSA in 1938, exempts common carriers from the statutory restriction on the transportation of hot goods.[5] The second exception, added in 1949, exempts bona fide purchasers if, but only if, they can show that they acquired the goods for value, in good faith, without notice of FLSA violations, and after obtaining written assurances from the producer that the goods were produced in compliance with the Act; it imposes "[a]n affirmative duty * * * upon [the purchaser] to assure himself that the goods in question were produced in compliance with the Act." H.R. Rep. 1453, 81st Cong., 1st Sess. 31 (1949). See 29 C.F.R. 789.5. Given these precisely drawn exceptions, petitioner cannot plausibly suggest that an additional exception should be implied for the benefit of secured creditors. See generally *Andrus* v. *Glover Construction Co.*, 446 U.S. 608, 616-617 (1980). As the court of appeals observed, petitioner "should not be in a better position as a secured creditor, for which Congress has not created an exception[,] than as a 'good faith purchaser,' for which

[5] This exception was included in the statute to "prevent a case involving the constitutionality of the act from arising in a suit between a shipper and a common carrier" over the carrier's "obligation to accept goods for transportation." H.R. Rep. 2182, 75th Cong., 3d Sess. 14 (1938).

Congress specifically added an exception" (Pet. App. 12a).[6]

A literal reading of Section 15(a)(1) also accords with this Court's usual approach to the FLSA. "The Court has consistently construed the Act 'liberally to apply to the furthest reaches consistent with congressional direction,' * * * recognizing that broad coverage is essential to accomplish the goal of outlawing from interstate commerce goods produced under conditions that fall below minimum standards of decency." *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, No. 83-1935 (Apr. 23, 1985), slip op. 6 (quoting *Mitchell* v. *Lublin, McGaughy & Associates*, 358 U.S. 207, 211 (1959)). The Court has explained that exemptions from the FLSA's requirements are appropriate only if "plainly and unmistakably within [the Act's] terms and spirit" (*Phillips Co.* v. *Walling*, 324 U.S. 490, 493 (1945)), and should not be "enlarge[d] by implication." *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 618 (1944). See *Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 517 (1950); *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 295 (1959).

Indeed, notwithstanding petitioner's hints to the contrary (see Pet. 20-21), the Secretary of Labor has consistently maintained that Section 15(a)(1), like

[6] The fact that, as petitioner notes (Pet. 5), Ely's promised wage rates satisfied the requirements of the FLSA has no legal significance. The Act is concerned with the amounts employees are actually paid, and it is undisputed that Ely itself could not lawfully ship the goods in question until it paid its employees. The question in this case is whether that statutory prohibition followed the goods into the hands of Ely's creditor.

the other provisions of the Act, should be read broadly. The Secretary has brought successful actions under the provision against a range of persons who, like petitioner, were at least one step removed from the employer who committed the minimum wage or overtime violation. See, *e.g.*, *Advance Bag & Paper Co.* v. *United States*, 133 F.2d 449 (5th Cir. 1943) (manufacturer covered where producer of component materials violated the Act); *Wirtz* v. *Lone Star Steel Co.*, 405 F.2d 668, 670 (5th Cir. 1968) (mill owner covered where violation committed by independent contractor). See also *Walling* v. *Acosta*, 140 F.2d 892, 894 (1st Cir. 1944) (person need not be the employer who violated 15 U.S.C. 206 or 207 to be bound by Section 15(a)(1)).

b. The court of appeals' conclusion that Congress meant what it said when it applied Section 15(a)(1) to "any person" is clearly confirmed by the legislative history. The FLSA was enacted shortly after this Court's invalidation of a congressional delegation of power in *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935). Especially because of that decision, the Act was drafted with as much precision as possible, with the aim of avoiding a delegation challenge. As the Senate Committee on Education and Labor explained, "[t]he committee has diligently endeavored to write in the law itself, the rules and legal prohibitions intended to accomplish the desired objectives * * * [t]he committee seeking thus to decide every question that calls for a decision by Congress on legislative policies." S. Rep. 884, 75th Cong., 1st Sess. 5 (1937).

The careful attention paid to the language of the Act by the drafters is particularly significant here, because Congress devoted considerable attention to

the question whether "innocent" purchasers of hot goods should be exempted from Section 15(a)(1)—ultimately rejecting a provision that would have lifted the ban on the movement of hot goods under certain circumstances. That proposed provision, contained in a bill that passed the Senate, would have permitted a Labor Standards Board to exempt goods from the reach of Section 15(a)(1) if the Board found that the persons with an interest in the goods had no reason to believe that any substandard labor condition existed in the production of such goods or that such exemption is necessary to prevent undue hardship or economic waste. S. 2475, 75th Cong., 1st Sess. § 21(d) (1937). This provision, however, did not appear in the bill that passed the House or in the final bill that emerged from conference. See H.R. Rep. 2738, 75th Cong., 3d Sess. 33 (1938). Congress thus deliberately declined to carve out an exception for persons who were not directly responsible for the violation of the Act.

c. The court of appeals' literal reading is also entirely consistent with the policy of the Act. This Court has explained that "the goal [of the Act is to] outlaw[] from interstate commerce goods produced under conditions that fall below minimum standards of decency." *Tony & Susan Alamo Foundation*, slip op. 6. The Act implements President Roosevelt's declaration that "[g]oods produced under conditions which do not meet rudimentary standards of decency should be regarded as contraband and ought not be allowed to pollute the channels of interstate trade." H.R. Doc. 255, 75th Cong., 1st Sess. 3 (1937). See *Darby*, 312 U.S. at 115.[7] The prospect that goods

[7] That the court of appeals permitted petitioner to sell the goods on the condition that it compensate the unpaid em-

produced under conditions that violate the Act will be barred from interstate commerce provides a strong incentive to employers to adhere to the Act's minimum wage and overtime provisions; it also removes the unfair competitive advantage enjoyed by sellers of cheaply produced hot goods. See *id.* at 109-110; 29 U.S.C. 202(a).

These purposes are furthered by the ruling below. Applying Section 15(a)(1) to petitioner obviously serves "to lessen * * * the distribution in commerce of goods produced under subnormal labor conditions." *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 727 (1947). And it means that not only struggling employers like Ely, but also creditors that, like petitioner, closely oversee the operations of such employers are put on notice that failure to pay employees is not an acceptable (or profitable) means of cutting costs. Most important, it eliminates the financial advantages that creditors like petitioner would otherwise obtain as a direct result of the failure of debtors like Ely to comply with the Act: by liquidating finished goods rather than bulk raw materials, petitioner would benefit from what is still the unpaid labor of Ely's employees, and the reading of the statute for which petitioner contends would give creditors

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ployees if Section 15(a)(1) is found applicable does not, as petitioner suggests (Pet. 6 n.7), undercut the court of appeals' recognition (see Pet. App. 7a) that the hot goods are contraband. By requiring petitioner to hold an amount equal to the value of the unpaid wages in escrow pending resolution of this case, the court "effectively removed the 'taint' from the goods" (*id.* at 10a n.9). In any event, petitioner may not invoke this practical accommodation, made at its request, permitting it to substitute cash for tangible collateral, as determinative of any legal issue in the case.

a direct incentive to encourage the continuation of the manufacturing operations under conditions where employees may not be paid.

2. a. Petitioner's principal argument against following the plain language of the FLSA is that the plain language of Section 15(a)(1) establishes a "secret" lien for employee wage claims that interferes with the rights established under otherwise applicable bankruptcy law (Pet. 8, 10-11). To begin with, that contention has no application in this case: Ely never filed for bankruptcy, and this case accordingly does not involve any conflict between Code-established priorities and the operation of the FLSA.[8]

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[8] Petitioner is incorrect in asserting (Pet. 11-12, 15-16) that this case raises the possibility of a conflict between the reach of Section 15(a)(1) and "the intended operation of other federal statutes" (Pet. 11) or state insolvency laws (Pet. 12). The FLSA, as construed by the court of appeals, is plainly consistent with, for example, the Packers and Stockyards Act and the Perishable Agricultural Commodities Act. See *Ruckleshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018 (1984). The Packers and Stockyards Act creates a trust in meat (and proceeds from its sale) in favor of all unpaid sellers of livestock (7 U.S.C. 196(b)), giving such sellers priority over secured lenders in bankruptcy (see *First State Bank* v. *Gotham Provision Co.*, 669 F.2d 1000 (5th Cir.), cert. denied, 459 U.S. 858 (1982)) and under the Uniform Commercial Code (see *Fillippo* v. *S. Bonaccurso & Sons, Inc.*, 466 F. Supp. 1008, 1022 (E.D. Pa. 1978)). The Perishable Agricultural Commodities Act (7 U.S.C. (Supp. II) 499e(c)), was patterned after the Packers and Stockyards Act and affords sellers of such commodities the same protection. See *In re Fresh Approach, Inc.*, 48 Bankr. 926 (Bankr. N.D. Tex. 1985). The FLSA, unlike those statutes, does not create a lien and therefore does not displace otherwise applicable lien priorities. Petitioner likewise has failed to demonstrate any conflict between Section 15(a)(1) and any state insolvency law that would require this Court to consider the question of pre-

More fundamentally, as the court of appeals correctly observed, "[the] holding [in this case] does not change the priorities in bankruptcy" (Pet App. 10a). Section 15(a)(1) imposes a specific restriction, grounded in public policy, on the use of certain goods. The court of appeals ruled only that the public policy restriction remains applicable to the goods when they pass to a foreclosing creditor. That ruling did not alter petitioner's rights in the collateral as against Ely, nor did it give Ely's employees any rights in the property.

The ruling below is consistent with the settled principle that a foreclosing creditor does not obtain greater rights in the collateral than his debtor had. It is undisputed that Ely failed to comply with the FLSA and therefore could not have shipped the goods in interstate commerce. Petitioner—which, the courts below found, knew it was funding Ely's payroll (Pet. App. 19a) and continued monitoring Ely's production even after the financing agreement was terminated—should not have expected to gain greater rights when it took possession of the property. Nor does a literal reading of the FLSA make the extension of credit unduly hazardous: lenders, including petitioner in this case, routinely monitor their borrowers' activities closely to ensure that the borrowers comply with both public law and their obligations to other creditors, lest a legal bar or a superior lien (for taxes, to a supplier, or to employees) bar the exercise of the lender's rights.

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emption. In any event, if Section 15(a)(1) were inconsistent with state law, as petitioner contends, it is readily apparent from the cases petitioner itself cites (Pet. 14 n.18) that the federal law would control. See, *e.g.*, *Philko Aviation, Inc.* v. *Shacket*, 462 U.S. 406, 410 (1983).

b. As the court below recognized, Section 15(a)(1) is part of the "laws of the land," reflecting a public policy to which, with specified exceptions, all interests in covered property are subordinated. An action by the Secretary for injunctive relief under Section 17 of the FLSA, 29 U.S.C. 217, therefore is "primarily directed to promote a strong public policy of protecting employers who pay a lawful wage" (*Brennan* v. *T & T Trucking, Inc.*, 396 F. Supp. 615, 618 (N.D. Okla. 1975)), and thus is "primarily in the public interest despite the fact that employees may be the ultimate beneficiaries." *Donovan* v. *University of Texas*, 643 F.2d 1201, 1208 (5th Cir. 1981). See *Darby*, 312 U.S. at 114; *Wirtz* v. *Jones*, 340 F.2d 901, 903 (5th Cir. 1965).[9]

The distinction between the enforcement of a statutory mandate reflecting public policy and the enforcement of creditors' rights is now expressly recognized by the Bankruptcy Code itself, in 11 U.S.C. 362(b)(4), which excepts exercises of a "governmental unit's police or regulatory power" from the automatic stay otherwise imposed by 11 U.S.C. (& Supp. II) 362(a)(1) on proceedings against a debtor to collect pre-petition debts. Under Section 362(b)(4), "where a governmental unit is suing a debtor to prevent or stop a violation of * * * police or regulatory

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[9] As an enforcement action brought to vindicate the public interest, a suit such as this one cannot be seen as an attempt to collect a debt or impose a lien, whatever the effects of such a suit on the secured creditor's ability to dispose of its property. See *University of Texas*, 643 F.2d at 1208; *Donovan* v. *Brown Equipment & Service Tools, Inc.*, 666 F.2d 148, 156-157 (5th Cir. 1982); *Jones*, 340 F.2d at 903; *Donovan* v. *TMC Industries, Ltd.*, 95 Lab. Cas. (CCH) ¶ 34,278, at 44,976 (N.D. Ga. 1982); *T & T Trucking*, 396 F. Supp. at 617-618.

laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay." S. Rep. 95-989, 95th Cong., 2d Sess. 52 (1978).[10]

Relying on the broad public welfare purposes underlying the FLSA in general and Section 17 in particular, the district and bankruptcy courts uniformly have concluded that enforcement proceedings under Section 17 fall within the Section 362(b)(4) exception. See *TMC Industries*, 95 Lab. Cas. (CCH) ¶ 34,278 at 44,979-44,981; *Donovan* v. *Timbers of Woodstock Restaurant, Inc.*, 93 Lab. Cas. (CCH) ¶ 34,155, at 44,426 (N.D. Ill. 1981); *In re Tauscher*, 24 Wage & Hour Cas. (BNA) 1310, 1311-1312 (Bankr. E.D. Wis. 1981); cf. *T & T Trucking*, 396 F. Supp. at 618. As construed by the courts in these cases, the exception from the automatic stay provided by Section 362(b)(4) "permits the government to enforce its laws uniformly without regard to the debtor's position in the bankruptcy court." *TMC Industries*, 95 Lab. Cas. (CCH) ¶ 34,278, at 44,977. To the extent that an action authorized by Section 362(b)(4) affects any priority, then, it is "not a

[10] Because of 11 U.S.C. 362(b)(4), governmental authorities have been permitted to proceed with a wide variety of regulatory or police measures despite the pendency of bankruptcy proceedings. *E.g.*, *Penn Terra Ltd.* v. *Department of Environmental Resources*, 733 F.2d 267 (3d Cir. 1984) (injunction against debtor to correct violations of state environmental protection statutes); *Commodity Futures Trading Comm'n* v. *Incomco, Inc.*, 649 F.2d 128 (2d Cir. 1981) (providing Commodity Futures Trading Commission access to debtor's books and records on trading activities); *National Labor Relations Board* v. *Evans Plumbing Co.*, 639 F.2d 291 (5th Cir. 1981) (petition for reinstatement of discriminatorily discharged employees with backpay).

priority to proceeds from the estate, but a priority in terms of having access to any proper court to enforce laws that promote public health and welfare * * * The Fair Labor Standards Act clearly is such a law." *TMC Industries*, 95 Lab. Cas. (CCH) ¶ 34,278, at 44,981.

3. Petitioner also asserts that review is required to resolve a conflict between the decision below and the decisions of the Second and Fourth Circuits in *Wirtz* v. *Powell Knitting Mills Co.*, *supra*, and *Schultz* v. *Factors, Inc.*, 65 Lab. Cas. (CCH) ¶ 32,487 (4th Cir. 1971). While the decision of the court of appeals here is inconsistent with *Powell Knitting Mills*, this conflict is neither sufficiently fixed nor of sufficient importance to warrant consideration by the Court.

Prior to this litigation (and excluding the *Powell Knitting Mills* and *Factors* lawsuits), the issue involved here was addressed by the courts only twice, both times in districts in the Sixth Circuit. *Dunlop* v. *Sportsmasters, Inc.*, 77 Lab. Cas. (CCH) ¶ 33,293 (E.D. Tenn. 1975) (following *Powell Knitting Mills*); *Brock* v. *Kentucky Ridge Mining Co.*, C.A. No. 85-0180-O(M) (W.D. Ky. Oct. 11, 1985) rejecting the "judicially created exception" to Section 15(a)(1) used in that case).[11] Because actions to enforce

[11] The United States District Court for the Middle District of Tennessee recently granted a temporary restraining order enjoining both an employer and its secured creditor from moving hot goods in violation of Section 15(a)(1) of the FLSA. *Brock* v. *LTW Sportswear, Inc.*, C.A. No. 2-86-0075 (M.D. Tenn.). Secured creditors have intervened as defendants in at least two other Section 15(a)(1) enforcement actions that were settled after preliminary injunctions were issued. *Donovan* v. *Standard Forge & Axle Co., Inc.*, C.A. No. 84-T-13 74 N (M.D. Ala.) (dismissed Nov. 15, 1984); *Donovan* v. *Fabrics America, Inc.*, C.A. No. 82-245-S (M.D. Ala.) (dismissed Jan. 12, 1984). The preliminary injunction in *Stand-*

Section 15(a)(1) against secured creditors are brought with such infrequency, the resolution of the conflict here will not have a significant effect on the administration of the FLSA.

In any event, the panel in *Powell Knitting Mills* relied in part on the rationale that preventing a secured creditor from selling hot goods "comes close to giving * * * wage claims a priority over secured creditors contrary to the scheme of the Bankruptcy Act [of 1898]." 360 F.2d at 733. The Second Circuit has not had a chance to consider the vitality of this ruling in light of Section 362(b)(4) of the new Bankruptcy Code, in which Congress provided that exercises of the police power, presumably including enforcement actions under Section 17 of the FLSA, should proceed independently of bankruptcy proceedings. It therefore is unclear whether the Second Circuit would follow *Powell Knitting Mills* if it were again confronted with a question about the applicability of Section 15(a)(1) to secured creditors. Indeed, the panel in *Powell Knitting Mills* recognized that, "[u]nder a literal * * * reading of the [Fair Labor Standards] Act, the government would be entitled to an injunction." 360 F.2d at 732. In these circumstances, there is no reason to believe that intervention by this Court is necessary to resolve the disagreement among the courts of appeals.[12]

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ard Forge restrained both the secured creditor, which had intervened after the temporary restraining order was issued, and the employer. The creditor in *Fabrics America* was not enjoined.

[12] The Fourth Circuit in *Factors* adopted the *Powell Knitting Mills* rationale and, like the Second Circuit, has not had an opportunity to reconsider the issue in light of Section 362(b)(4) of the new Bankruptcy Code. The *Factors* court, moreover, indicated that the shipment of hot goods could be

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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restrained when there was "collusion between the manufacturer and his financier permitting the introduction into the market of goods produced in violation of the Act." 65 Lab. Cas. (CCH) ¶ 32,487, at 44,732. Although the court did not explain what it meant by "collusion," it cited *Wirtz* v. *Lone Star Steel Co.*, 405 F.2d 668 (5th Cir. 1968). In that case, the court restrained the shipment of hot goods by a steel mill operator, finding that the operator could and should have known that its independent contractor had violated the FLSA's minimum wage requirements. 405 F.2d at 670. Here, petitioner "knew it was funding the payroll of Ely Group, Inc., and when this funding ceased Ely could not meet its payroll obligations to its employees" (Pet. App. 19a). Petitioner also knew as early as February 14, 1985, five days before its foreclosure resulted in the shutdown of Ely's operations, that Ely had defaulted on at least one payroll (J.A. 305-306). And petitioner shipped goods in interstate commerce "with knowledge that the employees of the various [Ely] entities had not been paid" (Pet. App. 21a). Given these circumstances, application of the *Factors* test to the record here would probably not have changed the outcome.

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